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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GLEN R. HAGEN, Plaintiff, v. NCR CORPORATION, Defendant.	Case No.: 07 CV 2205 DMS (CAB) **PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO EX PARTE APPLICATION TO CONTINUE EXPERT DESIGNATION AND RELATED DATES** **[FRCP 26(a)(2)(C)]** Judge: Hon. Cathy Ann Bencivengo Trial Date: May 9, 2009, 9:00 a.m.

Plaintiff GLEN R. HAGEN hereby responds to Defendant's OPPOSITION to Plaintiff's *ex parte* application to continue expert designation and related dates.

I. NO PREJUDICE TO DEFENDANT SHOULD DESIGNATION DATE BE EXTENDED

Defendant's Opposition asserts that "to add some fifth 'expert' doctor…is just pure overkill intended to prejudice defendant and add undue cost and preparation time." In fact, there is no "fifth expert doctor". Indeed, there has never been even one expert doctor. Months ago defense counsel informally inquired of the names of the doctors who treated Plaintiff. Counsel then issued three document subpoenas, including one to Dr. Davidson. Since then only Dr. Davidson has been deposed. Her deposition arose when the undersigned asked defense counsel if Dr. Davidson could be present at Plaintiff's deposition to help assess Plaintiff's ability to continue with his deposition. Defense counsel refused contingent upon deposing Dr. Davidson for the purpose of determining whether her presence at Plaintiff's deposition would be necessary. This is the sole understanding of the reason for Dr. Davidson's deposition. During the little more than one hour deposition of Dr. Davidson Mr. Scully announced he would not oppose Dr. Davidson being present at Plaintiff's deposition.

II. THERE WAS NEVER AN "UNDERSTANDING" THERE WOULD NOT BE EXPERT WITNESSES. IN FACT, ATTORNEY SCULLY WAS TOLD "DR. DAVIDSON WILL NOT BE PLAINTIFF'S EXPERT."

In an email dated May 12, 2008, from the undersigned to Miles D. Scully, Esq., wherein arrangements were being discussed for taking Dr. Davidson's deposition, the undersigned disclosed to Mr. Scully that: "Dr. Davidson will not be Plaintiff's expert." The implication, of course, is some other doctor will be Plaintiff's expert. At no time did Mr. Scully express any concern, surprise, or misunderstanding about Dr. Davidson's role, or the role of Plaintiff's forensic expert. A copy of this email is attached as EXHIBIT A, along with the string of associated emails.

III. PLAINTIFF'S COUNSEL HAS NEVER INFORMED DEFENSE COUNSEL THAT SEVERAL DOCTORS, NO LESS FOUR TREATING DOCTORS, WOULD BE TESTIFYING IN THIS CASE

At no time has there been any discussion between counsel about testimony from any of Plaintiff's treating doctors. If Defendant truly believed any of Plaintiff's treating doctors were going to testify, wouldn't it be logical for Defendant to have deposed them? Never has Defendant sought to depose any treating doctor other than Dr. Davidson, and that was for the reason related above.

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IV. DEFENDANT'S RECENT POSTURING OF ITS CASE REQUIRES AN EXPERT WITNESS

Plaintiff's and Defendant's counsel have had discussions about this case. We agreed the same are confidential. Based thereon, it is represented to the Court that if Plaintiff is denied the opportunity to designate a forensic expert physician Plaintiff's case will be substantially prejudiced.

V. SINCE DEFENDANT HAS NEVER EXAMINED EVEN ONE OF PLAINTIFF'S DOCTORS AS AN EXPERT, DEFENDANT WILL NOT BE "…EXTREMELY PREJUDICED IN EXPENDING BOTH TIME AND MONEY TO EXAMINE AN ADDITIONAL NEUROLOGY EXPERT…"

Defendant makes the above claim in the context of having already examined other of Plaintiff's doctors. Defendant has only deposed, for approximately one hour, Dr. Davidson and it was to determine whether Mr. Scully would rescind his objection to her presence at Plaintiff's deposition. In fact, no "Plaintiff's expert" has ever been deposed because Plaintiff has never indicated he had any expert doctors or that any of his doctors would be testifying at trial. Therefore, to depose Plaintiff's true expert would pose no prejudice to Defendant in terms of time and money since it would be the only forensic expert who will testify regarding Plaintiff's medical condition.

VI. CONCLUSION

Defendant obfuscates the sole issue here which is whether Defendant will be prejudiced by extending the expert designation date. Obfuscation particularly occurs when counsel talks about Plaintiff's treating doctors as if they were experts and alleging they are sufficient for Plaintiff to present his case at trial. Counsel's advocacy exceeds reasonableness when he opines how best Plaintiff can present his evidence. Defendant's alleged prejudice is the cost to depose Plaintiff's true expert, that is, a forensic neurologist who can present Plaintiff's medical condition from an experienced perspective. Plaintiff submits having to depose one medical expert cannot be considered prejudicial.

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Plaintiff respectfully submits his request to extend time to designate experts should be extended.

Respectfully submitted,

THE GILL GROUP, A.P.C.

Dated: July 15, 2008

By: s/ Thomas R. Gill, Esq.

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